ORIGINAL

NO. 91-7094

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

-vs-

SAMUEL A. LEWIS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
NINTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the eighth and fourteenth amendments prohibit imposition of the death penalty when both the trial court and the Arizona Supreme Court have found that petitioner intended to cause, and did cause, the death of the victim, and the evidence at trial, including circumstantial evidence, supports those findings?

2. When the law of the state provides that if the prosecution proves one aggravating circumstance, the death penalty shall be imposed unless the defendant produces substantial mitigation, and the state proves beyond a reasonable doubt three aggravating circumstances, two of which petitioner has never challenged, does a federal habeas corpus court violate the constitution by determining: (a) under this Court's decision in Lewis v. Jeffers, a rational fact-finder could have found that petitioner committed the offenses in an especially heinous manner; (b) even if the especially heinous factor were eliminated, the remaining two, unchallenged aggravating circumstances would still justify the death penalty?

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OPINIONS BELOW

The Ninth Circuit Court of Appeals issued its opinion on December 26, 1990. Petitioner timely moved for rehearing and suggested rehearing en banc. On October 17, 1991, the panel who studied the record in this case and twice heard oral argument unanimously rejected the motion for rehearing and the suggestion for rehearing en banc. Four judges dissented from denial of the suggestion for rehearing en banc. (Appendix B to the Petition for Writ of Certiorari.) Richmond's counsel filed a renewed petition for rehearing and suggestion for rehearing en banc. Respondents moved to strike that renewed motion and the Ninth Circuit granted respondents' motion. On December 18, 1991, the Ninth Circuit filed an amended opinion and on January 14, 1992, the Ninth Circuit filed a further amended opinion. (Appendix A to this response.)

JURISDICTION

On December 26, 1990, the Ninth Circuit Court of Appeals issued its original opinion. Defense counsel filed a timely petition for rehearing, which was denied on October 17, 1991. Since the petition for a writ of certiorari was filed within 90 days of October 17, 1991, it is timely under this Court's rules.

Richmond invokes this Court's discretionary jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment, which provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition, this case involves the following provisions of Arizona law:

> In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

A.R.S. § 13-703(E).

* * *

> The defendant committed the offense in an especially heinous, cruel or depraved manner.

A.R.S. § 13-703(F)(6).

STATEMENT OF THE CASE

THE TRIAL

Saturday night, August 25, 1973 -- the last night of his life -- Vietnam veteran Bernard Crummett met Rebecca Corella, Faith Erwin, and Richmond at the Birdcage Bar in Tucson. Richmond, then 25, refused to let Faith, his 15-year-old girlfriend, prostitute herself with Crummett; Becky, a former girlfriend of Richmond's, agreed to do so. The foursome drove to Becky's apartment at the Sands Motel. (R.T. at 430-84, 539-49.)

When Becky gave Richmond the $20 bill Crummett gave her, Richmond, who apparently had worked this scam before, palmed the bill and protested that Crummett had given her only $10. As Crummett opened his wallet to produce another $20, Becky saw that it was "loaded" and told Richmond. He told Becky they could not rob Crummett there because he could remember the location of the apartment. After Becky and Crummett retired to the bedroom, Richmond told Faith they were going to rob Crummett, but to say nothing. (Id. at 437, 540-41.)

When Becky and Crummett emerged from the bedroom, Richmond, under the guise of providing Crummett another opportunity to have relations with Becky, drove the quartet almost to the end of 22nd Street and turned the station wagon around. It was after midnight. (Id. at 437-39, 541.)

Richmond got out and snatched Crummett out the passenger door on the driver's side. Richmond knocked him down; when he tried to get up, Richmond knocked him down again. Richmond looked around for large rocks and, standing directly above Crummett, threw those down upon Crummett's head. (Id. at 439-42, 542.)

When Becky and Richmond finished rifling Crummett's pockets, they got back into the car. The testimony of the only eyewitness to the murder, Faith Erwin, was that Richmond drove the car over Crummett. (Id. at 434.) That first pass literally exploded Crummett's skull. Approximately 30 seconds later, Richmond drove over Crummett's torso as he left the scene.

Richmond and Becky collected about $45 and an engraved watch. Richmond considered the watch worthless because of the engraving and discarded it. They returned to Becky's apartment, divided the money, and Richmond and Faith Erwin fixed with heroin. (Id. at 542-44.)

Deputy Peterson discovered Crummett's body in the middle of the street about 5:00 a.m. the next day. There was a 2-inch diameter hole in the forehead. (Id. at 488-91.) Police also found two large pools of blood, one 30 feet west of the body, and the other right next to it flowing from Crummett's head. (Id. at 109-10.) Two bloody 4-inch diameter rocks lay 29 and 13 feet west of the body. (Id. at 120-22.) The left front wheel well, hubcap and much of

the left side of the undercarriage of the station wagon Richmond drove bore blood and hair similar to Crummett's. (Id. at 240-41, 256-64, 271-72.)

Ironically, John Diaz, Crummett's cousin, was working in the County Coroner's Office the morning of August 27, 1973. He lifted the sheet from the face of the "John Doe" but did not recognize his cousin. Only when he saw the shrapnel wounds to the legs did he suspect the cadaver might be Crummett. (Id. at 214-18, 225-28.)

The pathologist concluded that a tremendous force, probably the wheel of a car, crushed Crummett's skull. That injury caused death. Because the injuries to the chest and abdomen displayed no hemorrhaging, he opined they were inflicted at least 30 seconds later, after the heart ceased beating, by a force moving in the opposite direction. (Id. at 155-66, 195-210, 240-68.)

In a statement to police, Richmond admitted he planned the robbery, drove to the isolated locale, pulled Crummett from the car, and beat him to the ground; he blamed Becky Corella for running over Crummett. (Id. at 538-49.)

Sheila Dewey (aka Holt) stated that she knew that Richmond had been driving the car August 24 through 26, the period covering the murder. According to Sheila, Becky was so short that she had difficulty reaching the clutch and brakes. (Id. at 379-86.)

Deputy Barkman said that no one he asked knew anything about Becky Corella's being able to drive the car; Sheila Dewey told him that Corella tried to drive it but could not. (Id. at 276-77.) Officer Manricus saw Richmond driving the car August 30, 5 days after the murder. (Id. at 423-26.)

Defense counsel produced Regina Davis, who told the jurors that Faith Erwin told her that Becky Corella drove the car over Crummett. Upon cross-examination, however, Davis admitted that she did not tell police that when they questioned her December 12, 1973. (Id. at 633, 641.)

The First Sentencing and Appeal

After an aggravation-mitigation hearing, the trial court found that the state had proved two aggravating circumstances, A.R.S. § 13-703(F)(2) (conviction of an offense involving the use or threat of violence upon a person), and A.R.S. § 13-703(F)(6) (the defendant did commit the offense in an especially heinous and cruel manner). The basis for finding the first circumstance was Richmond's prior conviction for the armed kidnapping (involving the use of a knife) of Raul Granadas in 1970. (R.T. of Feb. 25, 1974, at 212.) The finding that "the defendant did commit the offense in an especially heinous and cruel manner" was a finding that Richmond killed Bernard Crummett. When the trial court considered possible

statutory mitigating circumstances, it rejected as non-existent A.R.S. § 13-703(G)(4),[1] which read as follows:

> The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

A.R.S. § 13-703(G)(4). The trial court's refusal to find the existence of this circumstance meant that the trial court decided that Richmond could reasonably have foreseen that his conduct would cause, or would create a grave risk of causing, death to another person. Finding two aggravating factors and insufficient mitigation to call for leniency, the trial court sentenced Richmond to death.

While the direct appeal was pending, Richmond sought post-conviction relief. He appended to his petition affidavits from two people who said that Becky Corella told them that she was driving the vehicle when it ran over Bernard Crummett. In response to that, the prosecutor filed an affidavit stating that, during the course of the trial, the prosecutor spoke to Becky Corella in Tucson. She became angry, professed her love for Richmond, and threatened to take the stand for the defense and take the blame for the

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1. At the time of the original sentencing in February, 1974, the aggravating and mitigating factors were found in A.R.S. § 13-454(E) and (F). The legislature has since changed the numbering of those statutes to A.R.S. § 13-703(F) (aggravating factors) and § 13-703(G) (mitigating factors).

murder. The prosecutor informed Edward Bolding, Richmond's trial counsel, during the state's case-in-chief, that Ms. Corella was at that time "willing to take the rap" for Richmond. Afterwards, the prosecutor saw Mr. Bolding speaking with Ms. Corella in a small private office at the courthouse. Despite her availability and apparent willingness to testify, defense counsel did not call her at trial, or at the sentencing. (Appendix B to this response, 1974 Affidavit of Prosecutor James Howard.)

The state's response to the first post-conviction petition also included the affidavit of Detective Morris Reyna. He spoke personally with Becky Corella in Los Angeles on November 2, 1974. She adhered to her original statement, that Richmond drove the car over Crummett, and disclaimed any contrary statements. Detective Reyna stated that Ms. Corella was available for service of a subpoena. (Appendix C1 to this Response, Detective Reyna's 1974 Affidavit.) Attached to Detective Reyna's affidavit were Rebecca Corella's original statement of September 3, 1973, in which she stated that Richmond ran over Bernard Crummett, and the transcribed statement from Daniel McKinney taken at the Arizona State Prison on November 6, 1974, in which he stated that Rebecca Corella told him that Richmond had driven the car over Crummett, but Richmond and Spencer Watson (another convicted murderer) had threatened McKinney's life unless McKinney testified otherwise in court. (Respondents' Appendix C2-9.)

The trial court denied the petition for post-conviction relief, and defense counsel consolidated review of that denial with direct appeal.

On the first appeal, a unanimous Arizona Supreme Court affirmed the conviction for murder and the denial of post-conviction relief. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915 (1977). The Arizona Supreme Court sustained the death penalty on one aggravating circumstance, the prior conviction for armed kidnapping. That court did not consider the especially heinous, cruel, or depraved circumstance because Richmond lacked sufficient mitigation to reduce the penalty to life. 114 Ariz. at 196-98, 560 P.2d at 51-53.

FIRST FEDERAL HABEAS PROCEEDING

In 1978 the United States District Court in Arizona granted Richmond's petition for writ of habeas corpus. That court upheld his conviction for first-degree murder, but ruled that the Arizona death penalty statute, as it stood at that time, was constitutionally infirm because it did not allow for consideration of relevant mitigating factors not specifically enumerated in the statute. Richmond v. Cardwell, 450 F. Supp. 519, 526 (D. Az. 1978). Meanwhile, the Arizona Supreme Court reached the same conclusion in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1970). The Arizona Supreme Court ordered Richmond resentenced in early 1979, but defense

counsel requested at least 10 continuances that pushed the resentencing into March 1980.

RESENTENCING AND SECOND APPEAL

After a 3-day aggravation-mitigation hearing, the trial court found that Richmond had been convicted of another first-degree murder.[2] (Richmond's Appendix D 2-3 attached to the Petition for Writ of Certiorari.) The trial court again found that Richmond had been convicted of a crime involving the threat of violence, the armed kidnapping. (Id.) The trial court again stated its conclusion that "the defendant did commit the offense in this case in an especially heinous and cruel manner." (Id. at D-3.) Moreover, as it did at the first sentencing, the trial court refused to find as a mitigating factor that Richmond could not have reasonably foreseen that his conduct would cause, or create a grave risk of causing, death to another person. (Id. at D-3, D-4.) Although the trial court found several mitigating factors, it was not persuaded that Richmond's alleged change of character, upon which defense counsel offered extensive testimony, was genuine. (Id. at D-5.)

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2. Richmond's conviction for the first-degree murder of Mary Dawson was affirmed by the Arizona Supreme Court in State v. Richmond, 112 Ariz. 228, 540 P.2d 700 (1975). Respondents know of no documentation in the state courts, or in the federal proceedings, to substantiate Richmond's allegation at page 10, footnote 5, of the petition that he was acquitted on a third murder charge because his defense was that Rebecca Corella committed the murder.

Because the state proved three aggravating factors, and Richmond could not produce substantial mitigation, the trial court, in compliance with the Arizona statute, imposed the death penalty.[3]

With one justice dissenting, four justices of the Arizona Supreme Court again upheld Richmond's death sentence. (Appendix C to the Petition.) Justice Feldman believed that Richmond's mitigation warranted reducing the penalty to life. (Appendix C to the Petition at C-13.) The five justices rejected the trial court's finding that Richmond committed the murder in an especially cruel manner. However, Justices Hays and Holohan believed that the gratuitous violence, exhibited by the second run over the victim's torso after the first run over his skull crushed it and killed him, and the needless mutilation of the victim warranted finding that Richmond committed the murder in an especially heinous manner. (Id.

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3. For the first time, Richmond complains that the element of violence in the kidnapping conviction was established only by the testimony of the victim, and that subsequent Arizona case law has held such testimony improper to establish an aggravating circumstance. (Petition for Certiorari at p.8.) He cites State v. Schaaf, ___ Ariz. ___, 819 P.2d 909, 919-20 (1991). He fails to note that Schaaf cites State v. Gillies, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775 (1985), appeal after remand, 142 Ariz. 564, 691 P.2d 655 (1984). Gillies was decided 2-1/2 months before the Arizona Supreme Court issued its opinion on Richmond's second appeal and 4 months before the Arizona Supreme Court denied his motion for rehearing. State v. Richmond, 136 Ariz. 312, 666 P.2d 57, cert. denied, 464 U.S. 986 (1983). He did not challenge the use of the kidnapping conviction as an aggravating factor in his third state post-conviction petition (filed after the second appeal), in the district court, or before the Ninth Circuit.

at 8.) Justices Cameron and Gordon disagreed with the finding of heinousness, but they agreed that the death penalty was appropriate because of Richmond's record for violent crimes, particularly the other first-degree murder conviction. (Id. at 11-13.)

Because this Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), came down after Richmond was resentenced, but before the Arizona Supreme Court considered his appeal, the Arizona Supreme Court took great care to discuss why Enmund did not prevent imposition of the death penalty. That court noted that Richmond planned the robbery, drove the victim into the desert, pulled him from the car, and knocked him unconscious to rob him. Faith Erwin's testimony, and appellant's own statements admitted at trial, demonstrated that he threw large rocks at the victim after he knocked him to the ground. The state's evidence showed that Richmond drove the vehicle over the victim and killed him. The Arizona Supreme Court pointed out that the circumstantial evidence supported Faith Erwin's testimony. 136 Ariz. at 317-18, 666 P.2d at 62-63. In the alternative, the Arizona Supreme Court said that, even if that court accepted Richmond's contention that he was not driving the car, the demands of Enmund were still satisfied because of Richmond's leadership, concoction of the plan to rob, his use of violent force, his awareness that the victim, if allowed to live, could identify him, and his willingness to leave the wounded and unconscious victim alone

in the desert to an uncertain fate. (Id.) With no dissents, on this point, the Arizona Supreme Court finished its examination of the Enmund question with the following statement: "The evidence in this case shows that appellant intended to take a life." 136 Ariz. at 318, 666 P.2d at 63.

THE SECOND FEDERAL HABEAS CORPUS

In 1984, Richmond's attorneys filed a second petition for writ of habeas corpus in the district court. The district court twice summarily denied relief, but the Ninth Circuit remanded the case both times. The third time, the Honorable Alfredo Marquez, in a lengthy opinion, rejected all challenges and denied relief. Richmond v. Ricketts, 640 F. Supp. 767 (D. Ariz. 1986). The parties briefed the issues and the Ninth Circuit heard oral argument before this Court handed down Walton v. Arizona, 497 U.S. ___, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and Lewis v. Jeffers, 497 U.S. ___, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). The Ninth Circuit ordered supplemental briefing to consider the effect of Walton and Jeffers, and heard a second oral argument. A unanimous panel issued the opinion on December 26, 1990, which the panel has twice amended slightly. The panel unanimously rejected the petition for rehearing and the suggestion for rehearing en banc; of 28 active judges, only four dissented from the denial of rehearing en banc.

REASONS FOR DENYING THE WRIT

Richmond concedes that this Court's decision in Walton v. Arizona makes it clear that the Arizona Supreme Court has

developed a sufficiently narrowing construction of the especially heinous, cruel or depraved circumstance to withstand constitutional scrutiny, and that the Arizona Supreme Court itself may apply that narrowing construction even if the trial court failed to. (Petition at p.16.) Equally important, this Court's decision in Lewis v. Jeffers restricts a federal court's review of a state court's finding of an aggravating factor to whether any rational fact-finder, viewing the evidence in the light most favorable to the state, could have found the circumstance to exist. Nonetheless, Richmond urges this Court to grant certiorari for two reasons.

Ignoring the fact that both the trial court and the Arizona Supreme Court found two other aggravating circumstances, either of which required the imposition of the death penalty unless Richmond produced substantial mitigation, Richmond focuses upon the especially heinous circumstance found by only two of the four justices who believed that the death penalty was appropriate. He contends that those two justices could not have found that factor because neither the Arizona Supreme Court, nor the trial court, determined who drove the car over the victim. The record indicates that the trial court and the Arizona Supreme Court did determine that Richmond drove the vehicle over Bernard Crummett; the Ninth Circuit panel that studied the record properly limited its review to whether any rational

fact-finder could have found the especially heinous circumstance applicable.

Richmond also contends that certiorari should be granted to determine whether a federal court may ignore a state court's determination that the state statute requires a weighing of aggravating and mitigating factors against one another. That misstates the question. The question, as the panel in this case correctly and unanimously concluded, is whether the Constitution forbids the imposition of the death penalty upon the basis of two unchallenged aggravating factors, either of which under the Arizona statute required the death penalty, even if a third factor, found by only two of the four justices who voted for death, might arguably have been improperly found. Under such circumstances, the Constitution does not require a state supreme court to remand for a new sentencing.

I

THIS COURT SHOULD DENY CERTIORARI BECAUSE BOTH THE TRIAL COURT AND THE ARIZONA SUPREME COURT DID DETERMINE THAT RICHMOND DROVE THE CAR OVER BERNARD CRUMMETT AND A RATIONAL FACT-FINDER, UNDER THE CIRCUMSTANCES OF THIS CASE, COULD HAVE FOUND THE ESPECIALLY HEINOUS FACTOR APPLICABLE.

Richmond makes four points that, according to him, impair his death penalty: (1) the sentencing decision in this case "rested on the determination that the crime for which petitioner was convicted was especially heinous and cruel"; (2) the two justices who found the especially heinous factor

may not have applied it properly; (3) even if the Ninth Circuit was correct in concluding that a rational fact-finder could have found the especially heinous factor, that conclusion can not be sustained because no one ever determined who drove the car over the victim; and (4) although the Arizona Supreme Court apparently did decide that Richmond drove the care over Bernard Crummett, that court supposedly was incapable of making that determination because of conflicting evidence. (Petition for Certiorari at pp. 7-23.) Richmond relies in part on the dissent of four justices from the denial of rehearing en banc. None of those justices was on the panel that studied the full record in this case. The panel decision was unanimous.

Richmond's first error is stating that the sentencing decision in this case rested on the determination that his crime was especially heinous. (Petition for Certiorari at 17.) The sentencing decision in this case involved the unchallenged finding of two other aggravating circumstances, one involving the threat of violence during an armed kidnapping, and the other involving a separate conviction for another first-degree murder. Only two of the five justices of the Arizona Supreme Court found the especially heinous factor applicable, while none of the five found the murder to be especially cruel. For that reason, the district court held that Richmond had no standing to challenge the constitutionality of the circumstance because a majority of the Arizona Supreme Court found it not to exist and

did not base the sentence of death upon it. Richmond v. Ricketts, 640 F. Supp. 767, 795-96 (D. Ariz. 1986).

Richmond does not appear to challenge the limiting construction of the especially heinous factor applied by Justices Hays and Holohan. However, because he did so below in the briefs to the Ninth Circuit, respondents set forth here in full the facts upon which those two justices based their conclusion:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." State v. Knapp, supra. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra. In Gretzler, supra, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

> The presence of any one of the three elements - cruel, heinous, or depraved - is sufficient to constitute an aggravating circumstance. State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979). The trial court was correct in finding the offense was committed in an especially heinous manner. It is also evident that the trial court could have found that the offense was committed in an especially depraved manner.

State v. Richmond, 136 Ariz. at 319, 666 P.2d at 64.

The Ninth Circuit recognized that this Court in Walton v. Arizona upheld the constitutionality of Arizona's especially heinous, cruel or depraved circumstance on the basis of the limiting construction the Arizona Supreme Court had applied. (Appendix A to this Response at 19-21.) Rejecting Richmond's assertion that the two justices did not apply a sufficiently limiting construction in his case, the Ninth Circuit cited from the Arizona Supreme Court opinion the same passage respondents have cited above. (Id. at 21-22.) Cognizant of the restrictions placed upon federal review by this Court's decisions in Walton and Lewis, the Ninth Circuit applied the reasonable fact-finder standard of Lewis v. Jeffers to the especially heinous circumstance found by two state justices. (Id. at 23-26.) That court concluded that, under the definition applied by the Arizona Supreme Court, a rational fact-finder "could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death." (Id. at 26.)

Not directly questioning that conclusion, Richmond takes a different tact. He blends an Enmund question with the applicability of the especially heinous factor. He says that, even assuming the panel was correct in its conclusion that a rational fact-finder could have found A.R.S. § 13-703(F)(6) applicable, none of the Arizona justices could have done that because they never resolved the factual predicate for applying the limiting construction to the facts of this case, i.e., who caused the victim's death? (Petition for Certiorari at pp.20-21.)

Respondents have pointed out that, at both the original sentencing and the resentencing, the trial court found the existence of the especially heinous circumstance. In making that finding, the trial court stated that "The defendant did commit the offense in an especially heinous and cruel manner." Because the only offense to which that circumstance applied was first-degree murder, the trial court clearly was saying that Willie Lee Richmond committed the murder. One cannot commit an offense in a particular manner unless one commits the offense. On the second appeal after resentencing, the Arizona Supreme Court noted the trial court's finding of the especially heinous factor, and that court's conclusion that the defendant committed the offense. 136 Ariz. at 319, 666 P.2d at 74.

Performing its independent review, the Arizona Supreme Court considered whether Enmund v. Florida prohibited

imposition of death. First, that court noted that Richmond masterminded the plan to rob Bernard Crummett, drove the station wagon into the desert, pulled Crummett from it and knocked him to the ground. Then, according to Faith Erwin's trial testimony and Richmond's own statements admitted at trial, Richmond picked up large rocks and threw them at the victim's head. The bloody rocks found at the scene, and the nature of some of the wounds to Crummett's head, corroborated Erwin's testimony and Richmond's admissions. 136 Ariz. at 318, 666 P.2d at 63. The Arizona Supreme Court then said the following:

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of Enmund. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.
>
> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.
>
> Under either version of the facts appellant does not fit within the sphere of defendants the Enmund court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

136 Ariz. at 318, 666 P.2d at 63 (emphasis supplied). It is difficult to conceive how the Arizona Supreme Court could have stated more emphatically that its review of the record indicated that the trial judge did conclude that Richmond drove the vehicle over Crummett, and that the Arizona Supreme Court itself was persuaded that the evidence showed that Richmond intended to take a life.[4] Respondents remind the Court that, at both sentencings, the trial court specifically rejected the mitigating circumstance found in A.R.S. § 13-703(G)(4). That meant the trial court rejected any contention that Richmond could not reasonably have foreseen that his conduct would cause, or would

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4. The Ninth Circuit noted that the Arizona Supreme Court's findings also satisfied Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). Having beaten Crummett unconscious, Richmond left him in the street at night, indifferent to his fate. (Appendix A to this response at 31-33.) At p.14, footnote 6, in his opening brief to the Ninth Circuit, Richmond conceded that his trial counsel presented testimony that at least six to eight cars drove down that street between the time Crummett was murdered and police discovered his body at 5 a.m. Defense counsel was trying to show that some other car might have run over Crummett. That only served to highlight Richmond's reckless indifference to human life, a mental state this Court held in Tison, sufficient to warrant the death penalty.

create a grave risk of causing, death to another person. That the trial court did not explicitly say "This Court finds that Willie Richmond drove the car over Bernard Crummett" is immaterial. None of that detracts from the trial court's clear findings, one in aggravation, and one in rejection of mitigation, that Richmond "did commit the offense in an especially heinous and cruel manner" and "could reasonably have foreseen that his conduct would cause the death of another person."

Even if the trial court had made no finding about who was driving the car, the Arizona Supreme Court was free to do that under this Court's decision in Cabana v. Bullock, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986). Here, as below, Richmond attempts to avoid Cabana by saying that, whenever there is a conflict in the evidence, the state appellate court cannot resolve that conflict but must remand to the trial court. Any passing allusion to that in Cabana was dictum, not part of the holding. The only eyewitness who ever testified under oath at any proceeding, Faith Erwin, said that Willie Lee Richmond drove the car over Bernard Crummett. Although Becky Corella was available to testify at trial, defense counsel did not call her, nor did he call her at the original sentencing. That was probably because of the affidavits of the prosecutor and Detective Reyna submitted in November 1974, indicating that Corella was available to testify and that she would stick by her original statement that Richmond drove the car over Crummett. (Appendices B and C to this Response.) At the mitigation hearing

preceding the resentencing, Regina Collins (formerly Davis) said that Faith Erwin told her that Becky was driving. On cross-examination, however, Regina admitted that Faith never said anything about a man being run over, and that some of the things to which Regina was testifying could be due to "some things that I have heard or that had been planted in my mind." (R.T. of Mar. 12, 1980, at 60, 70.) Daniel McKinney testified at the resentencing that Becky Corella told him that she drove the station wagon over Crummett, but the state impeached him thoroughly with a previous statement he gave to police in which Richmond admitted to him having driven the station wagon over Crummett, and sent him word in prison that Richmond and Spencer Watson (another convicted murder) would kill McKinney if McKinney did not testify that Becky Corella ran over Crummett. (Id. at 116-24.) Although the prosecution went to considerable effort to locate both Faith Erwin and Becky Corella, the only eyewitnesses to the murder, and defense counsel stipulated on the record that the prosecutor had provided him with their locations, defense counsel called neither woman at the resentencing. (R.T. of Mar. 11, 1980, at 29-30.) Thus, no eyewitness to the murder ever testified under oath in contradiction of Faith Erwin's trial testimony. It seems more than a fair inference that the refusal of two different defense attorneys, at the first sentencing and at resentencing, to call either Corella or Erwin was due to lack of confidence that either woman would have said that Richmond was not driving the car.

Respondents have previously pointed out that other evidence at trial strongly corroborated Faith Erwin's testimony. For instance, Sheila Dewey (a/k/a Holt) stated that she knew that Richmond had been driving the station wagon from August 24 to August 26, the period covering the murder. According to Sheila, Becky Corella was so short, that she had difficulty reaching the clutch and the brakes. (R.T. at 379-86.) Deputy Barkman said that no one he asked knew anything about Becky Corella's being able to drive the station wagon; Sheila Dewey told him that Corella could not drive it. (Id. at 276-77.) Officer Manricus saw Richmond driving the car on August 30, 5 days after the murder. (Id. at 423-26.) This testimony prompted the Arizona Supreme Court to observe in its opinion after resentencing that the circumstantial evidence supported Faith Erwin's testimony. 136 Ariz. at 318, 666 P.2d at 63.[5]

With that kind of evidence in the record, it is ridiculous to maintain that the Arizona Supreme Court could not independently determine that Richmond drove the station wagon over Crummett. Having considered the Enmund challenge, the Ninth Circuit concluded that "The Arizona Courts have predicated Richmond's sentence upon a sufficient finding of criminal intent."

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5. This Court noted in Lewis v. Jeffers that state court findings of aggravating factors often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." 110 S. Ct. at 3103, quoting Jackson v. Virginia, 443 U.S. at 319, 99 S. Ct. at 2789.

(Appendix A to this Response, at 33.) Richmond cannot demonstrate, from a fair reading of the entire record, that no rational fact-finder, viewing the evidence in the light most favorable to the state, could have found the especially heinous circumstance to exist, nor can he establish that the Arizona courts did not make a finding that he killed and intended to kill.

II

EVEN IF THE ESPECIALLY HEINOUS FACTOR WERE ELIMINATED, NOTHING IN CLEMONS V. MISSISSIPPI OR THE PRACTICE OF THE ARIZONA SUPREME COURT IN ITS REVIEW OF CAPITAL CASES WOULD REQUIRE A REMAND FOR RESENTENCING BECAUSE THE TWO REMAINING, UNCHALLENGED AGGRAVATING CIRCUMSTANCES, AND RICHMOND'S FAILURE TO ESTABLISH SUFFICIENT MITIGATION, JUSTIFY THE DEATH PENALTY.

Richmond maintains that the Ninth Circuit misunderstood the procedure utilized by the Arizona Supreme Court in that court's review of capital cases. He implies that, because it is the Arizona Supreme Court's usual practice to remand a case for resentencing when it eliminates an aggravating circumstance, that the Arizona Supreme Court should have done that in his case because three of the five justices did not agree that the especially heinous circumstance applied. The real constitutional question, however, is whether there is any prohibition against a state supreme court's affirming the death penalty without remanding to the trial court when the state supreme court upholds two other valid aggravating circumstances.

Below, Richmond relied upon the Ninth Circuit's en banc decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), to argue that invalidation of any aggravating circumstance required a remand for resentencing. (Appendix A to this Response at 28.) The panel, reading Adamson correctly, noted that Adamson merely stated that it was the common practice of the Arizona Supreme Court to remand when that court invalidated an aggravating circumstance. (Id.) Nothing in Adamson suggested that the United States Constitution required a remand. (Id.)

Although the Arizona Supreme Court may remand when it eliminates an aggravating circumstance, it reserves the discretion to determine whether the remaining aggravating circumstances justify the imposition of the death penalty without remanding to the trial court. State v. Brewer, CR-88-0308-AP (Ariz. Sup. Ct., Jan. 28, 1992) (elimination of one of two aggravating circumstances did not necessitate a remand for resentencing or impair the death penalty); State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986) (elimination of one of four aggravating circumstances did not require remand); State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied, 467 U.S. 1220 (1984) (elimination of one of three aggravating circumstances did not require a remand); State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, cert. denied, 464 U.S. 865 (1983) (elimination of one of two aggravating circumstances did not require a remand); State v. Blazak, 131

Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882 (1982) (elimination of one of five aggravating circumstances did not require remand); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 456 U.S. 984 (1982) (elimination of one of three aggravating factors did not require resentencing); State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980) (elimination of one of three aggravating circumstances did not require resentencing). In this case, as in every capital case, the Arizona Supreme Court made an independent examination of the entire record to determine the existence of aggravating and mitigating circumstances, the weight to give each, and the propriety of the death penalty. The Arizona Supreme Court explicitly stated that it was making that kind of a review in this case. State v. Richmond, 136 Ariz. at 320, 666 P.2d at 65.

Two of the four justices who believed that the death penalty was properly imposed did not find the existence of the especially heinous factor. Nonetheless, in their independent evaluation of aggravation and mitigation, Justices Cameron and Gordon believed that Richmond's prior record of violent crimes, a conviction for armed kidnapping and another separate conviction for first-degree murder, warranted the death penalty. State v. Richmond, 136 Ariz. at 323-24, 666 P.2d at 68-69. Richmond argues that because the other two justices who voted for the death penalty believed that the crime was also especially heinous (a

mistake, in Richmond's estimation) the Arizona Supreme Court could not affirm the death penalty, but was obliged to remand to the trial court for resentencing. There are three flaws in Richmond's reasoning: (1) failure to properly evaluate the nature of the Arizona statute; (2) a mistaken reading of this Court's decision in Clemons v. Mississippi, 44 U.S. ___, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990); and (3) failure to take into account this Court's decision in Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983).

In Arizona, one aggravating circumstance mandates the death penalty unless the defendant can produce substantial mitigation. A.R.S. § 13-703(E). This Court upheld that statute in Walton v. Arizona, 110 S. Ct. at 3056. This is a fundamental and radical distinction from the statutes in Clemons and Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). Aggravating circumstances in Georgia merely make the defendant eligible for the death penalty, they do not determine punishment. Clemons v. Mississippi, 110 S. Ct. at 1446. In Mississippi, on the other hand, the finding of aggravating factors is part of the sentencing determination. Id. However, unlike Arizona, the Georgia and Mississippi statutes do not require imposition of the death penalty if an aggravating circumstance is found. To the contrary, the Georgia and Mississippi statutes allow the sentencers, the jurors in those states, to decline to

impose the death penalty, regardless of the number of aggravating factors proved or the lack of mitigation. Zant v. Stephens, 462 U.S. at 871-72, 103 S. Ct. at 2740 (the sentencer has absolute discretion not to impose death); Clemons v. Mississippi, 110 S. Ct. at 1445 (the trial court instructed the jurors several times that they need not sentence Clemons to death even if they found no mitigating circumstances). The panel that decided Richmond's case was quite aware of the distinction between the Arizona statute and the Mississippi statute in Clemons. (Appendix A to this Response at 29.)

Clemons v. Mississippi does not require resentencing when the state supreme court eliminates an aggravating circumstance:

> [T]he state court in this case, as it had in others, asserted its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been or was improperly presented to the jury. The court did not consider itself bound in such circumstances to vacate the death sentence and to remand for a new sentencing proceeding before a jury. We have no basis for disputing this interpretation of state law . . . .

Clemons v. Mississippi, 110 S. Ct. at 1447 (emphasis supplied). This Court remanded Clemons to the Mississippi Supreme Court because this Court could not tell whether the Mississippi Supreme Court reweighed the remaining valid aggravation against the mitigation without considering the

admittedly unconstitutional circumstance, or applied harmless error review to uphold the death sentence. 110 S. Ct. at 1444. There is another crucial distinction between the aggravating circumstance in Clemons and Arizona's especially heinous circumstance. This Court noted at the beginning of its opinion in Clemons that the jury instruction about the especially heinous, atrocious or cruel circumstance "was constitutionally invalid in light of our decision in Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)." 110 S. Ct. at 1444. By contrast, this Court has upheld the Arizona Supreme Court's limiting construction of the especially heinous, cruel or depraved circumstance. Walton v. Arizona.

Appreciating the significant distinctions between the Arizona statute and the statute in Clemons, the Ninth Circuit rejected the argument that elimination of one aggravating factor would necessitate a remand:

> Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in Clemons. The Mississippi law that Clemons considered authorizes the death penalty if "'there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances.'" Id. at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty two or three times and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. See id. §§ 13-703(C), (E). Under the statute at issue in Clemons, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Id. § 13-703(E).

(Appendix A to this Response at pp.29-30; emphasis supplied.)

Although Richmond's contention that resentencing is necessary in this case turns on the erroneous assumption that no rational fact-finder could have found the especially heinous circumstance applicable, an assertion rejected by the Ninth Circuit, even if he were right, the Constitution still would not require resentencing. In Zant v. Stephens, this Court said that one of the factors to consider in determining the propriety of a death sentence based in part upon an admittedly unconstitutionally vague circumstance was the reason that circumstance was held invalid. 462 U.S. at 864,

103 S. Ct. at 2736. Although the Georgia Supreme Court, prior to considering Stephens, had declared unconstitutionally vague the statutory aggravating circumstance concerning "a substantial history of serious assault and criminal convictions," that court upheld Stephens' death penalty based on two other aggravating circumstances, and this Court affirmed. In affirming, this Court noted that the Georgia Supreme Court said that it might have reached a different conclusion if the evidence received by the jurors had been improper or some other arbitrary factor had entered into the sentencing decision. However, the Georgia Supreme Court said that the evidence of Stephens' prior assaultive behavior was properly received by the jurors and could properly have been considered. 462 U.S. at 873, 103 S. Ct. at 2740. This Court accepted that reasoning and found, as an additional safeguard against arbitrary imposition of the death penalty, the Georgia Supreme Court's review of the record and the death penalty to determine whether the sentence was arbitrary or disproportionate. 462 U.S. at 876, 103 S. Ct. at 2742. This Court noted that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, but the Constitution does not require the sentencer to ignore other possible aggravating factors in the process of selecting those who will actually be sentenced to death. 462 U.S. at 878, 103 S. Ct. at 2743.

The Arizona statute requires the sentencer to consider any evidence relating to aggravation or mitigation that was introduced at trial. A.R.S. § 13-703(C). Thus, there was absolutely nothing improper in the consideration by two Arizona justices of the facts at trial demonstrating the gratuitous violence inflicted upon Bernard Crummett, two passes over his body from different directions after the first pass killed, or the needless mutilation of his body. Richmond has never argued that the sentencer could not consider these facts, nor could he reasonably do so. His argument is that the two Arizona justices could not consider these facts as a statutory aggravating circumstance. Even if he were right, the Constitution and this Court's cases would not have forbidden those two justices from considering the manner in which Richmond murdered. Because two other unchallenged aggravating circumstances fully support the death penalty, and the two justices who found the especially heinous factor considered nothing impermissible or unconstitutional, the Constitution does not require a resentencing.

The conclusion above is strengthened by this Court's decision in Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983), decided the same year as Zant v. Stephens. The trial judge, a veteran of World War II, found that Barclay's extensive criminal record was an aggravating circumstance. 463 U.S. at 944, 103 S. Ct.

at 3422. The State of Florida conceded before this Court that, under Florida law, a defendant's prior criminal record is not a proper aggravating circumstance. Id. at 946, 103 S. Ct. at 3423. In addition, Barclay complained that the trial judge added a second improper aggravating factor by discussing the racial motive for the murder and comparing it with the judge's experience in World War II when he saw Nazi concentration camps. Id. at 948-49; 103 S. Ct. at 3424. This Court rejected both contentions. Even though the trial court's finding of Barclay's criminal record as a non-statutory aggravating circumstance violated Florida law, nothing in the Constitution prohibited the trial court from considering that criminal record or the racial motive. 463 U.S. at 956, 103 S. Ct. at 3428. By the same token, nothing in the Constitution prevented two Arizona justices from considering the properly admitted trial evidence about the gratuitous violence and needless mutilation inflicted upon Bernard Crummett from two passes of the car over his body.

CONCLUSION

The Ninth Circuit has correctly applied this Court's decisions in Walton v. Arizona and Lewis v. Jeffers, and properly performed its limited review. Willie Lee Richmond has had the benefit of two sentencings, two direct appeals, three state post-conviction petitions, and two federal habeas corpus proceedings. He has had every opportunity to present any valid reason why the death penalty should not be upheld. This August will mark the 19th year since Richmond killed Bernard Crummett and, on a separate occasion, Mary Dawson. Respondents respectfully ask this Court to bring this case to a conclusion by denying certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

HC 5-18
RICHMOND

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIE LEE RICHMOND, *Petitioner-Appellant,* v. SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison, *Respondents-Appellees.*	No. 86-2382 D.C. No. CV-84-010-T-ACM ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted September 18, 1987
Submission Vacated September 22, 1987
Reargued and Submitted September 27, 1990
San Francisco, California

Filed December 26, 1990
Amended January 14, 1992

Before: Arthur L. Alarcon and Diarmuid F. O'Scannlain, Circuit Judges, and Albert Lee Stephens,** District Judge.

Opinion by Judge O'Scannlain

*Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

**The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

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OPINION

O'SCANNLAIN, Circuit Judge:

Willie Lee Richmond, who was sentenced to death upon conviction of first-degree murder in Arizona state court, appeals from the district court's denial of his petition for habeas corpus. He contends that imposition of capital punishment will violate his rights under the sixth, eighth, and fourteenth amendments. We now affirm.

I

A

This case arises from Richmond's conviction in 1974 for first-degree murder in the death of Bernard Crummett. On an August evening seventeen years ago, the victim met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have

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sex with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.

Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corella and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.

The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella — the testimony conflicts — told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground. As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:

> Q. [Mr. Howard, Prosecutor]
> Then what happened?
>
> A. [Erwin]
> Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.

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Q. And where did you go from there?

A. Back to the Sands Motel.

Q. Did you run over anything?

A. Yes, a man. It was a bump, after we were leaving.

Q. After you felt that bump, was anything said in the car when you felt that bump?

A. Becky [Corella] said, it felt like a man's body.

Q. Who was driving the car?

A. Willy [sic].

Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several blood-stained rocks were found in the immediate vicinity of the body. Second, he testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and the abdominal section. This too the

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pathologist attributed to an automobile tire, which impacted the body from th. opposite direction at least thirty seconds after the fatal blow. He concluded, therefore, that the victim was twice run over — once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith [Erwin], she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of

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first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> • • • •
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> • • • •
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all person[s] who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.[1]

[1]On August 9, 1974, Richmond was convicted of first-degree murder on one of the two unrelated charges and sentenced to life imprisonment. "It is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond v. Ricketts*, 640 F. Supp. 767, 780 (D. Ariz. 1986). At the time of that earlier murder, "the death [penalty] had not yet become effective [in Arizona] so that the sentence of life imprisonment was the only possible sentence." *Id.* Richmond was acquitted of the other murder. *See id.*

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B

After a separate hearing held before the trial judge alone, the court pronounced its sentence:

> The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death.

State v. Richmond, 114 Ariz. 186, 189, 560 P.2d 41, 44, *cert. denied*, 433 U.S. 915 (1976).

Richmond petitioned in state court for post-conviction relief claiming the discovery of new exculpatory evidence. He presented an affidavit from Daniel McKinney, a former boyfriend of Corella, in which McKinney stated that Corella had admitted to being the driver when the car ran over Crummett. The state countered with a transcribed tape recording in which McKinney claimed that Richmond had threatened him in prison. The petition for relief was denied. On automatic appeal, the Arizona Supreme Court affirmed both the conviction and the sentence, holding inter alia that (1) Richmond's case was properly submitted on a theory of felony murder, (2) post-conviction relief was properly denied, and (3) the Arizona death penalty statute was constitutional, both as written and as applied. *See* 114 Ariz. at 190-98, 560 P.2d at 45-53.

After the United States Supreme Court denied certiorari on direct appeal, Richmond petitioned for a writ of habeas corpus in the federal district court of Arizona. He argued that the Arizona statute unconstitutionally deprived him of the opportunity to present non-statutory mitigating circumstances before

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the judge at sentencing. The district court upheld Richmond's conviction but ruled the Arizona statute unconstitutional under the eighth and fourteenth amendments for its failure to allow consideration of a convict's character. *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978). The court therefore vacated Richmond's sentence.[2]

At a second sentencing hearing in March 1980, the state trial court again found no mitigating circumstances sufficient to warrant leniency, and it resentenced Richmond to death. Once again, on mandatory appeal, the Arizona Supreme Court affirmed the sentence. *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, 464 U.S. 986 (1983). Independently reviewing the record,[3] the state supreme court found that Richmond had actively participated in the robbery and had played an integral role in the events leading up to Crummett's death. Although it acknowledged that the force of Richmond's manual blows had not caused the death, the court held that circumstantial evidence supported Erwin's testimony that Richmond had been the lethal driver. It found that the sentence was appropriate under these conditions. Again on direct review, the United States Supreme Court denied certiorari. 464 U.S. 986 (1983).

Richmond then pursued a second writ of habeas corpus in federal court. After a brief hearing, the district court denied the writ and dismissed the petition. Four days later, a panel of this court stayed Richmond's execution and issued a certificate of probable cause to provide time for a full-fledged appeal. In due course, the court affirmed dismissal for failure to exhaust state remedies, but it remanded with instructions to allow amendment to permit the prosecution of any claims that

[2]The Arizona death penalty statute was subsequently revised to cure this defect. *See* Ariz. Rev. Stat. Ann. § 13-703(G), *as amended by* 1979 Ariz. Sess. Laws ch. 144, § 1 (effective May 1, 1979).

[3]*See infra* note 10.

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had been properly exhausted.[4] *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir. 1984). Following such amendment the district court again denied Richmond's petition, and this court again reversed, remanding for a full review of the state record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). After reviewing the full record, the district court denied Richmond's petition for the third time in a thirty-five page opinion. *Richmond v. Ricketts*, 640 F. Supp. 767 (D. Ariz. 1986).

Richmond now appears before this court with the assistance of counsel to appeal this most recent denial order. This court originally entertained oral argument in his appeal on September 18, 1987, but deferred submission pending the en banc decision of this circuit in *Adamson v. Ricketts*. *See* No. 84-2069 (9th Cir. Aug. 14, 1987) (en banc) (order scheduling oral argument for Oct. 20, 1987, in light of *Ricketts v. Adamson*, 483 U.S. 1 (1987)). *Adamson* presented a similar challenge to the constitutionality of Arizona's revised death penalty statute. A year later, in December 1988, the *Adamson* court ruled the Arizona statute unconstitutional. 865 F.2d 1011 (9th Cir. 1988) (en banc). Arizona petitioned the Supreme Court of the United States for review of that decision, and this court further deferred submission pending that outcome.

In the meantime, on direct review from the state's highest court, the Supreme Court of the United States announced in *Walton v. Arizona* that the Arizona death penalty statute is *not* unconstitutional. 110 S. Ct. 3047 (June 27, 1990), *reh'g denied*, 111 S. Ct. 14 (Aug. 30, 1990). In a companion case

[4]Under the "total exhaustion rule" announced by the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 (1982), a federal court cannot adjudicate a habeas petition if it contains any unexhausted claims — even if it also contains exhausted claims. The remand order was intended to satisfy this rule. *See* 730 F.2d at 1318.

Upon amending his petition, Richmond continued to assert eighteen claims. *See* 774 F.2d at 959.

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decided that same day, *Lewis v. Jeffers*, the Court restated and elaborated upon its *Walton* holding. 110 S. Ct. 3092, *reh'g denied*, 111 S. Ct. 14 (1990). On the following day, the Court denied certiorari in *Adamson. Lewis v. Adamson*, 110 S. Ct. 3287 (1990), *denying cert. to Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc).

In light of these developments, this court ordered the parties to file supplemental briefs, and on September 27, 1990, the court entertained a second oral argument to consider the effects of *Walton*, *Jeffers*, and other recent Supreme Court decisions on this appeal. The court thereafter took the entire appeal under submission for decision.

II

A

The district court had proper jurisdiction under 28 U.S.C. § 2241. This court has proper jurisdiction under 28 U.S.C. § 2253. We review the denial of a habeas corpus petition de novo. *See Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). However, under 28 U.S.C. § 2254(d), the factual findings of state trial and appellate courts are presumed correct if fairly supported by the record. *See Sumner v. Mata*, 449 U.S. 539, 546-47 (1981).

B

Richmond has presented four arguments: (1) that Arizona's death penalty law is unconstitutional both on its face and as applied, (2) that the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death and that imposition of the death penalty would therefore violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982), (3) that he was improperly denied an evidentiary hearing on his claim that Arizona's administration of the death penalty is unconstitutionally discriminatory, and (4) that fulfillment of

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his sentence after so many years on death row would constitute cruel and unusual punishment. Respondent Arizona has challenged all four contentions and has further argued that Richmond's petition constitutes an abuse of the writ. We address the state's latter contention first and then address Richmond's arguments sequentially.

III

In its 1978 judgment on Richmond's first petition for habeas relief, the district court vacated Richmond's sentence but affirmed his conviction. The State of Arizona argues that because Richmond failed to appeal the affirmance of his conviction at that time, it is abuse of the writ to challenge the conviction now. *See* 28 U.S.C. § 2244(b); Rules Governing Section 2254 Cases, Rule 9(b). A prior panel of this court has already addressed this contention. *See Richmond*, 774 F.2d at 959-61. We are bound to adopt its conclusions as the law of the case. *See Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981); *see also* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 119 (2d ed. 1988) ("If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.").

[1] Thus, to the extent that Richmond seeks to challenge his conviction on grounds that were available to him when he filed his first petition, we agree that he is barred from doing so now:

> The relief obtained on the first petition went only to the sentence. The incentive remained, therefore, for Richmond to appeal the rejection of his challenges to the *underlying conviction*, since if he were to prevail on appeal on these claims, he could not be resentenced. The district court could properly decline to reconsider these underlying-conviction claims when raised in a second petition.

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Richmond, 774 F.2d at 960 (emphasis in original). Whether termed abuse of the writ or res judicata, the reassertion of such claims is not permissible at this stage.

[2] Richmond, however, has focused his attention in the current appeal on challenging the re-imposition of his sentence. This he certainly may do, and in so doing, he may challenge the death penalty on grounds that were available to him but that he did not raise when contesting his first sentence:

> Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or has raised the claims only to "vex, harass, or delay." None of these three situations applies to Richmond's petition.

Id. at 961 (citing *Sanders v. United States*, 373 U.S. 1, 18 (1963)). Richmond may also renew challenges to the death penalty that were raised in his first petition and *decided against him* by the district court:

> [W]hen the district court enjoined Richmond's [initial] death sentence, it relied solely on the [original] Arizona statute's failure to consider mitigating factors of an individual's character. *Richmond v. Cardwell*, 450 F. Supp. at 526. Because Richmond had obtained the sentencing relief he sought, he had no incentive to appeal the adverse determination of his other grounds for challenging the death sentence, and perhaps would not have been permitted to do so on mootness or ripeness grounds. The ends of justice would not be served by denying Richmond appellate consideration of these other constitutional challenges to the death penalty merely because he obtained relief on a different ground.

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Id. at 960. With respect to any of the proffered challenges to his sentence, therefore, "Richmond's petition does not constitute an abuse of the writ." *Id.* at 961.

IV

A

At the time of Richmond's conviction in 1974, Arizona law defined first-degree murder in relevant part as follows: "A murder which is perpetrated by . . . any . . . kind of wilful, deliberate and premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree." Ariz. Rev. Stat. Ann. § 13-452 (repealed 1978) (current version at § 13-1105). For those convicted of first-degree murder, the Arizona code provides a sentencing hearing independent of the trial. § 13-703(B). Here, the trial judge must choose without the assistance of a jury between the options of life imprisonment and capital punishment. § 13-703(A)-(B). For purposes of this determination, a special verdict is required regarding the existence or non-existence of any aggravating or mitigating factors. § 13-703(D). The statute puts the burden of establishing the existence of any aggravating factors on the prosecution and the burden of establishing the existence of any mitigating factors on the defense. § 13-703(C). The statute then channels the court's discretion:

> [T]he court . . . shall impose a sentence of death if the court finds *one or more* of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

§ 13-703(E) (emphasis added).

Subsection F enumerates ten aggravating circumstances, including the following three:

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(1) The defendant was previously convicted of a felony in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

(2) The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

* * * *

(6) The defendant committed the offense in an especially heinous, cruel or depraved manner.

§ 13-703(F). By the time of Richmond's resentencing in 1980, subsection G of the statute had been revised to read as follows:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to [(1) the defendant's incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, (2) the defendant's suffering of unusual or substantial duress, (3) the defendant's relatively minor participation in the crime, (4) the defendant's reasonable inability to foresee that his conduct would cause or would create the grave risk of causing death, and (5) the defendant's age].

§ 13-703(G).

B

Richmond challenges the constitutionality of this revised sentencing scheme on four grounds. First, he contends that

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judicial determination of the existence or nonexistence of aggravating circumstances impermissibly usurps the jury's fact-finding function. Second, he claims that requiring the defense to establish the existence of any mitigating circumstances illegitimately shifts the burden of proof. Third, he argues that the Arizona statute creates an unconstitutional presumption that death is the proper sentence. Finally, he insists that imposing the death penalty upon finding that the killing was "especially heinous, cruel or depraved" is unconstitutionally vague.

[3] The Supreme Court's recent decision in *Walton v. Arizona* specifically addressed and rejected the first three contentions, and Richmond has not forcefully advanced these arguments since.[5] With respect to the judicial determination of sentencing factors, the Court stated: " 'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.' " *Walton*, 110 S. Ct. at 3054 (quoting *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446 (1990)). Indeed, even before *Walton*, it was well settled that " 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' " *Id.* (quoting *Hildwin v. Florida*, 490 U.S. 638, _, 109 S. Ct. 2055, 2057 (1989)); *see generally id.* at 3054-55 (Part II of the opinion). As the district court noted when it rejected this argument in Richmond's first petition:

[5]We have already had occasion to note *Walton*'s rejection of the first and third contentions. *See Smith v. McCormick*, 914 F.2d 1153, 1169-70 (9th Cir. 1990). We also note in passing that Richmond's able and experienced counsel, Timothy K. Ford, is intimately familiar with the *Walton* case. Mr. Ford represented Jeffrey Alan Walton in his petition before the United States Supreme Court. This fact — in addition to the cases' underlying similarity — may help to explain why several of the arguments raised here are identical to arguments decided by the Court in that case. *See infra* note 7 (noting the factual similarities between the two cases).

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> "[The Supreme Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Richmond, 450 F. Supp. at 523 (quoting *Proffitt v. Florida*, 428 U.S. 242, 252 (1976)).*

[4] The *Walton* Court likewise rejected the contention that requiring the defendant to establish the existence of mitigating factors impermissibly shifts the burden of proof. Denying that the practice violates the eighth and fourteenth amendments, the Court ruled:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

*Since the *Walton* decision, Richmond has apparently conceded that the sixth amendment does not require jury factfinding at the sentencing phase in capital punishment cases, but he has stressed the alternative argument that the equal protection clause *does* require jury factfinding at sentencing. Because Arizona law provides for jury factfinding in many similar circumstances, Richmond contends, it is arbitrary and irrational not to provide for it here. We find this argument unpersuasive. As the Supreme Court noted in *Proffitt*, there is indeed a rational reason for committing the factfinding function to the judge at the sentencing phase in capital punishment cases, and it probably promotes more evenhanded justice to do so. *See Proffitt*, 428 U.S. at 252. Moreover, the Court's sixth amendment holding on this issue in *Walton* would make little sense if the broader, less specific terms of the equal protection clause could be read to require the opposite result.

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Walton, 110 S. Ct. at 3055; *see generally id.* at 3055-56 (Part III of the opinion).

[5] Finally, the *Walton* Court also rejected the claim that the Arizona statute creates an impermissible presumption that death is the proper sentence for first-degree murder. Like Richmond, Walton had challenged the statute's directive that a court "*shall* impose a sentence of death" if it finds one or more aggravating circumstances and no substantial mitigating circumstances. Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). Walton had contended, as Richmond does here, that this provision violates the proscription against mandatory death sentences announced in *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court disagreed, citing its recent decisions in *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), and *Boyde v. California*, 110 S. Ct. 1190, *reh'g denied*, 110 S. Ct. 1961 (1990), both of which had upheld similarly worded capital punishment laws. The Court ruled that so long as the statute provides individualized sentencing and does not automatically impose death for certain categories of murder, it passes constitutional muster under *Woodson*. *See generally Walton*, 110 S. Ct. at 3056 (Part IV of the opinion).

In short, the Supreme Court has specifically rejected three of the constitutional arguments raised here, and it has done so in the context of reviewing the very same statute.

C

Richmond insists, however, that his fourth constitutional challenge to the statute survives *Walton*. Indeed, he contends that *Walton* itself renders his death sentence unconstitutional and that this court's en banc decision in *Adamson v. Ricketts* mandates resentencing. *See Adamson*, 865 F.2d 1011 (9th Cir. 1988) (en banc), *cert. denied sub nom. Lewis v. Adamson*, 110 S. Ct. 3287 (1990). We are not persuaded.

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In *Walton*, another Arizona inmate who was convicted of first-degree murder and sentenced to death challenged his sentence on constitutional grounds.[7] The Supreme Court denied all four of his claims and affirmed the sentence. Despite this result, Richmond contends that Walton's fourth claim and the Court's disposition of that claim bolster his petition.[8]

[7]The facts of the *Walton* case are strikingly similar in many respects to the facts of the present case. Walton, who also acted with the assistance of two friends, "went to a bar in Tucson, Arizona, . . . intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert . . . . In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine." 110 S. Ct. at 3052. Forcing Powell to accompany them, the three commandeered his car and drove to a remote area on the outskirts of town. When they stopped, they

> forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. . . . Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told [his two accompanying friends] that he had shot Powell and that he had "never seen a man pee in his pants before."

Id. Despite the similarities, the circumstances of Powell's death were somewhat more gruesome than those of Crummett's:

> Powell's body was found approximately a week later . . . . A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

Id.

[8]Walton's first three claims, which were also raised by Richmond, were the three claims discussed in Part IV-B above. First, Walton alleged that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge." 110 S. Ct. at 3054; *compare* Ariz. Rev. Stat. Ann. § 13-703(B). Second, he alleged that the Arizona statute unconstitutionally "imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances." 110 S. Ct. at

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In his fourth claim, Walton alleged that the aggravating circumstance found and relied upon by the sentencing judge — his commission of the crime "in an especially heinous, cruel or depraved manner" — was unconstitutionally vague. Ariz. Rev. Stat. Ann. § 13-703(F)(6); *see* 110 S. Ct. at 3056-57. The Supreme Court agreed that the relevant statutory provision was vague but did not agree that it was unconstitutional. In essence, the Court held that facial vagueness alone does not decide the question: one must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions — and even extra-statutory procedural safeguards — may preserve the scheme's constitutional integrity. *See generally Walton*, 110 S. Ct. at 3056-58 (Part V of the opinion).

The Court found three such safeguards within Arizona law. First, the Arizona scheme provides for sentencing by a judge, not by a jury. That fact alone distinguished *Walton* from *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), two cases relied upon by Walton in which the Supreme Court had invalidated death sentences due to similarly vague statutory definitions of aggravating circumstances. Where a judge makes the sentencing findings there is less danger of impermissibly broad applications of statutory terms: "Trial judges are presumed to know the law and to apply it [correctly] in making their decisions." *Walton*, 110 S. Ct. 3057.

Second, the Court found, the Arizona Supreme Court had effectively salvaged the suspect provision by affording it a

3055; *compare* Ariz. Rev. Stat. Ann. § 13-703(C). Third, he alleged that the Arizona statute "creates an unconstitutional presumption that death is the proper sentence" because it *requires* the death penalty "if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 110 S. Ct. at 3056; *compare* Ariz. Rev. Stat. Ann. § 13-703(E). The Supreme Court rejected all three of these claims as well as the fourth, which is discussed herein.

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"limiting definition" in the course of reviewing the trial judge's sentencing decision. What the state legislature had improvidently left out, the state supreme court properly inserted:

> The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." . . .
>
> * * * *
>
> Recognizing that the proper degree of definition of an aggravating factor is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision *by the Arizona Supreme Court* is constitutionally sufficient because it gives meaningful guidance to the sentencer.

Id. at 3057-58 (quoting *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989)) (emphasis added). By injecting this limiting definition into a sentencing process already restricted to judges, Arizona provided ample protection for Walton's constitutional rights.

> If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is *irrelevant* that the statute itself may not narrow the construction of the factor.

Id. at 3057 (emphasis added).

Third, the Court reasoned:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. _, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Id.

In his reliance on *Walton*, Richmond points out as an initial matter that the same aggravating circumstance at issue in that case was cited by the Arizona Supreme Court in its review of his death sentence. Richmond insists that the terms of this aggravating circumstance — "especially heinous, cruel or depraved" — are facially vague. He is undeniably correct; *Walton* held so explicitly. Richmond then argues, however, that whereas the Arizona Supreme Court cured this potential defect in *Walton*, it failed to do so in his case. The court, he maintains, applied no comparable "limiting construction" in its review of his sentence. This contention is empirically incorrect.

[6] In reviewing Richmond's sentence, the Arizona Supreme Court quite clearly *did* provide a limiting construction for the admittedly vague aggravating circumstance. In fact, if anything, the state court provided a more narrowly tailored and more obviously sufficient limiting construction in Richmond's case than it did in Walton's:

> "Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive man-

ner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S. Ct. 1458, 55 L. Ed. 2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, [135 Ariz 42, 659 P.2d 1 (1983)]; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. . . .

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. . . .

. . . We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

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Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (plurality opinion) (finding Crummett's killing especially heinous and depraved but not especially cruel);[9] *compare id. with Walton*, 159 Ariz. at 586-88, 769 P.2d at 1032-34.

[7] As in *Walton*, the sentence in this case was (a) imposed by a trial judge presumably knowledgeable in the law, (b) thoroughly and independently reviewed by the Arizona Supreme Court, and (c) reimposed under a sufficiently limiting construction.[10] Under a fair reading of *Walton* and the record alone, therefore, Richmond's contentions must fail.

[8] Richmond attempts to avoid this conclusion by challenging the legal accuracy of the Arizona Supreme Court's limiting construction. He cites several state court decisions, most notably *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1

[9]Richmond argues that only two of the five Justices of the Arizona Supreme Court concurred in this portion of the court's opinion. He is correct. Two other Justices voted to affirm the sentence but on other grounds. They explicitly rejected the argument that the killing had been especially heinous and depraved. *See Richmond*, 136 Ariz. 322-24, 666 P.2d at 67-69 (Cameron, J., concurring and Gordon, V.C.J., joining). The fifth Justice dissented altogether. *See* 136 Ariz. 324-26, 666 P.2d at 69-71 (Feldman, J., dissenting). The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty. *See infra* Part IV-D.

[10]*See Richmond*, 136 Ariz. at 317, 666 P.2d at 62 ("[I]n each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case . . ."); 136 Ariz. at 320, 666 P.2d at 65 ("In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each. We also independently determine the propriety of the sentence.").

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(1983), for the proposition that the court applied a definition of the aggravating circumstance that is untenable under Arizona law. This court, however, is foreclosed from engaging in any such inquiry. A federal appellate court cannot challenge the Arizona Supreme Court on matters of Arizona law; in that realm, the authority of the state court remains supreme.

Both *Walton* and its companion case, *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990), support this analysis. As *Walton* pointed out, the relevant focus for this court's attention is not upon the language of the Arizona statute per se or even upon the sentencing decision of the state trial judge; rather, it is upon the constitutional legitimacy of Richmond's sentence as that sentence stands *today* after review by and exhaustion of the state court process. *See Walton*, 110 S. Ct. at 3057-58. The only question for this court is whether the *final* state result violates constitutional law so as to warrant granting a writ of habeas corpus. *Walton* requires this court to pay due deference to state judicial systems in the administration of their own criminal sanctions and to recognize both the competence and duty of state courts of general jurisdiction to enforce federal constitutional law.

Jeffers thoroughly reinforces the *Walton* rule. In *Jeffers*, the Supreme Court restated and reapplied the *Walton* holding to deny another Arizona prisoner's challenge to the legitimacy of his death sentence. Because *Jeffers* was before the Court on collateral review, the Court concluded that even greater deference was owed to the state system than the Court had urged in *Walton*, which it had heard on direct review. The Court never reached the merits of Jeffers's constitutional claims, and it certainly never approached any questions of state law; rather, the Court reached its decision upon formulation of the appropriate standard of review. Writing for the Court, Justice O'Connor explained:

> [R]espect for a state court's findings of fact and application of its own law counsels against the sort

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> of *de novo* review undertaken by the Court of Appeals in this case. . . . Where the issue is solely whether a state court has properly found existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably — perhaps even quite plainly — fit within the statutory language." . . .
>
> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We held in *Jackson* that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine . . . "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jeffers, 110 S. Ct. at 3102-03 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 450 (1980) (White, J., dissenting) and *Jackson v. Virginia*, 443 U.S. 307, 319, *reh'g denied*, 444 U.S. 890 (1979)) (emphasis in original).

In short, this court's focus must not be on the underlying sentence but on whether the *state system* in both imposing and reviewing that sentence committed an *independent* constitutional violation. To vacate Richmond's sentence, this court would have to find that there is no rational basis in law or fact for the state supreme court's final evaluation that the circumstances warrant the sentence of death:

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> [A] federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: if a State's aggravating circumstances adequately perform their constitutional function, then the state court's application of those circumstances raises, apart from due process and eighth amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case — *including a de novo finding by an appellate court that a particular offense "is especially heinous . . . or depraved"* — is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. at 3103 (emphasis added).

We therefore reject Richmond's invitation to "conduct[ ] a *de novo*, case-by-case comparison of the facts" of various state court precedents. *Id.* at 3101. Like the Supreme Court in *Walton*, we "conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient." *Walton*, 110 S. Ct. at 3058. Applying *Jeffers*, we further conclude that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death.

D

[9] Even if Richmond were to prevail in his claim that the Arizona Supreme Court failed to provide a sufficiently limiting construction for the aggravating circumstance discussed above, however, his contentions would still lack merit. The Arizona Supreme Court rested its affirmance of his sentence upon a finding of not one, but three aggravating circumstances and an insufficient showing of mitigating circumstances. *See Richmond*, 136 Ariz. at 318-21, 666 P.2d at 63-

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66. The second aggravating factor relied upon was Richmond's conviction for another murder six months after his initial conviction. Although this latter conviction postdated Richmond's first, "[i]t is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond*, 640 F. Supp. at 780; *see supra* note 1. In any event, both convictions were duly on record by the time of Richmond's resentencing in 1980.

Furthermore, although the state supreme court explicitly found and addressed only these two aggravating circumstances, it held that "[t]he trial court correctly found three aggravating circumstances." *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. The third was an entirely separate prior conviction for kidnapping — statutorily relevant for death penalty purposes as an offense "involving the use or threat of violence on another person." Ariz. Rev. Stat. Ann. § 13-703(F)(2)." Arizona law explicitly provides that a single aggravating circumstance may suffice for imposition of the death penalty. *See* § 13-703(E).

Richmond does not contend, nor could he reasonably, that the statutory definitions of these two other factors are uncon-

"The court also hinted at the possible applicability of a fourth aggravating circumstance: the defendant's commission of the crime in expectation of pecuniary gain. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5); *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. Although noting that the trial court had improperly analyzed this factor in reaching the conclusion that it did not apply, the Arizona Supreme Court declined to determine whether under a proper analysis it would apply.

With respect to consideration of Richmond's kidnapping conviction, the Arizona Supreme Court's majority opinion does not address it except to express general agreement with the trial court's reliance upon it. The concurrence, which was endorsed by two Justices, is somewhat more explicit in its embrace of the lower court's reliance on both the prior murder conviction *and* the prior kidnapping conviction. *See Richmond*, 136 Ariz. at 323-24, 666 P.2d at 68-69 (Cameron, J., concurring and Gordon, V.C.J., joining).

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stitutionally vague. *See* § 13-703(F)(1)-(2). Rather, he sidesteps consideration of these additional factors by citing this circuit's en banc decision in *Adamson v. Ricketts* for the proposition that invalidation of any one aggravating circumstance requires resentencing. *See* 865 F.2d at 1037 n.42, 1038, 1039. We have just held that the aggravating circumstance to which Richmond refers is *not* invalid, but assuming for the sake of argument that it is, Richmond's reliance on *Adamson* is not well taken.

The Supreme Court granted certiorari in *Walton* specifically *because of* this circuit's en banc holding in *Adamson*,[12] and *Walton* reached the opposite conclusion regarding the Arizona statute's constitutionality. Even if the portion of *Adamson* upon which Richmond relies survives *Walton*, it still does not support his claim. Contrary to the suggestion, *Adamson* did not hold that invalidation of one aggravating circumstance automatically requires remand for resentencing; rather, the court simply noted that it is the common practice of the Arizona Supreme Court to remand for resentencing when *that court* invalidates an aggravating circumstance. *Id.* There is no suggestion in *Adamson* that the United States Constitution requires remand when one aggravating factor is eliminated from the analysis if sufficient other aggravating factors remain.

The Supreme Court's recent decision in *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), upon which Richmond also relies, is not to the contrary. In *Clemons*, a Mississippi inmate challenged the constitutionality of a death sentence imposed partially on the basis of a court's finding that it had been an

[12]*See Walton*, 110 S. Ct. at 3054 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, *see Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc), we granted certiorari."); *id.* at 3059 (Scalia, J., concurring) (describing *Adamson* and *Walton* as "essentially identical" cases).

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"especially heinous, atrocious or cruel" killing. *Id.* at 1445. The Mississippi law in question permitted imposition of the death penalty upon a finding of only one aggravating circumstance so long as that aggravating circumstance outweighed all mitigating circumstances. Finding the state supreme court's consideration of the "especially heinous" factor impermissibly vague, the Supreme Court remanded for resentencing.

[10] The Court did not hold, however, that imposition of the death penalty on the basis of the single remaining aggravating factor would have been ipso facto unconstitutional. Rather, it implicitly recognized that reliance on a single aggravating factor *can* be constitutional. *See id.* at 1446, 1450-51. The Court remanded because once the vague factor was removed from the analysis, it was unclear from the Mississippi Supreme Court's opinion whether the one remaining circumstance still outweighed all the mitigating evidence. *See id.* at 1449-51 (Parts III-IV of the opinion).

[11] In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' " *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency*." Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require

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resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

V

Richmond next contends that because the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death, imposition of the death penalty would violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982). The defendant in *Enmund* had been convicted of felony murder and sentenced to death for his involvement in the killing of two robbery victims, even though the record only suggested that he was the driver of the get-away car. In vacating Enmund's sentence, the Supreme Court held that imposition of the death penalty violates the eighth and fourteenth amendments in the absence of a specific finding by the trier of fact that the defendant actually killed, attempted to kill, intended to kill, or contemplated that life would be taken:

> Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided

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> and abetted a robbery in the course of which murder was committed.

Id. at 798; *see id.* at 801.

Enmund, however, is clearly distinguishable from the present case. The jury that convicted Richmond received instructions on both premeditated and felony murder, and the record before us clearly provides sufficient evidence for a finding that Richmond expressly intended to participate in and to facilitate that murder. Moreover, the Supreme Court's holding in *Enmund* was predicated upon the attenuated nature of the defendant's responsibility for the deaths in that case. As the Supreme Court pointed out more recently in *Tison v. Arizona*, 481 U.S. 137, *reh'g denied*, 482 U.S. 921 (1987), *Enmund* does not stand for the blanket proposition that capital punishment is unconstitutional in cases of felony murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all — the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
>
> . . . .

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> . . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.

481 U.S. at 157-58 (footnote omitted).

Furthermore, in its independent review of the record in this case, the Arizona Supreme Court explicitly did consider *Enmund*, and it set forth findings sufficient to satisfy both that test and the Supreme Court's later pronouncements in *Tison*:

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. . . . There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.
>
> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony.

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Richmond, 136 Ariz. at 318, 666 P.2d at 63.[13]

[12] Nor does it matter that the *Enmund* finding was made by the state supreme court rather than by the original sentencing court:

> At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. . . .
>
> . . . [W]hen a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

Cabana v. Bullock, 474 U.S. 376, 386-87 (1986) (footnote omitted). Accordingly, we conclude that the Arizona courts have predicated Richmond's sentence upon a sufficient finding of criminal intent.

VI

[13] As a black male of moderate means, Richmond next contends that the district court erred in denying his request for

[13]Interestingly, the Arizona Supreme Court conducted its *Enmund* analysis in this case before the United States Supreme Court narrowed the *Enmund* holding in *Tison*. The United States Supreme Court decided *Enmund* in 1982; the Arizona Supreme Court affirmed Richmond's sentence in 1983; and the United States Supreme Court decided *Tison* in 1987.

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an evidentiary hearing upon his claim that Arizona's administration of the death penalty is racially, sexually, and socio-economically discriminatory. We disagree. A habeas corpus petitioner is entitled to an evidentiary hearing both if he "alleges facts which, if proved, would entitle him to relief" and if he did not receive a full and fair evidentiary hearing on the issue in the state court. *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see id.* at 312-19. The facts that Richmond has alleged, even if proven, would not entitle him to relief.

In support of his request for a hearing on this issue in the district court, Richmond made an extensive proffer of what he seeks to prove:

> The proffer included that, although 15% of the victims of homicides in Arizona since 1973 have been black, every person under death sentence was convicted of killing a white victim; that [although] approximately 10% of the persons convicted of homicide in Arizona since 1973 have been women, no women are on death row. All three experts who had examined the Arizona death sentencing process from 1973 to the present [March 1987] found significant discrepancies based on the victim's race; two found evidence of discrimination based on the defendant's race, and one demonstrated significant disparities based on sex and economic status as well.

Brief for Appellant at 38-39 (citations omitted). This proffered evidence, however, is precisely the sort of generalized statistical evidence that was rejected as unactionable by the Supreme Court in *McKleskey v. Kemp*, 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987). Even if proven, the statistical disparities to which Richmond points would be insufficient to support an inference of purposeful discrimination in his own case. To require the district court to weigh this evidence would be to suggest that Richmond's death sentence could conceivably be invalidated solely on the basis of his physical

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or social affinity to other defendants who are not now before this court but who may have suffered unconstitutional discrimination in their receipt of the same sentence. This we cannot do. To prevail in challenging his sentence under the equal protection clause, Richmond "must prove that the decision-makers in *his* case acted with discriminatory purpose." *McKleskey*, 481 U.S. at 292 (emphasis in original). Richmond has alleged no facts to suggest that either the Arizona Supreme Court, the state trial court, or the prosecutor's office acted with prejudicial or discriminatory purpose in either seeking or imposing his sentence. The district court thus properly denied his request for an evidentiary hearing on this issue. *See generally id.* at 292-320.

VII

[14] Richmond's final contention is that fulfillment of his sentence after sixteen years on death row would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[14] We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.

On the other hand, the State of Arizona has directed the court's attention to two relevant, though not controlling, precedents. In a decision affirmed two years later by the Tenth Circuit, the United States District Court for the District of

[14]Richmond actually alleged that fulfillment of his sentence after *thirteen* years on death row would constitute cruel and unusual punishment. Because he raised that claim in his opening brief, which was filed in 1987, we have added the past three years during which we deferred submission of his appeal. We note, however, that because this appeal properly concerns Richmond's sentence only as of the date of its reimposition in 1980, the relevant period of his residency on death row is actually ten years.

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Utah rejected a similar claim brought by a habeas corpus petitioner who had been on death row for ten years. *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919, *reh'g denied*, 485 U.S. 1015 (1988). The court reasoned that to accept the petitioner's argument would be "a mockery of justice" given that the delay was attributable more to the petitioner's actions than to the state's. *Id.* Like Richmond, the petitioner in *Andrews* had sought "extensive and repeated review of [his] death sentence." *Id.* Arizona also points to the well-known decision of the California Supreme Court in *People v. Chessman*, in which that court rejected the same claim by an eleven-year death-row inmate. 52 Cal. 2d 467, _, 341 P.2d 679, 699 (1959), *cert. denied*, 361 U.S. 925, *reh'g denied*, 361 U.S. 941 (1960). Finally, we note the decision of the United States Supreme Court in *Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968), which the district court cited in its rejection of this claim and which held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case. *See Richmond*, 640 F. Supp. at 803 (citing *Harrison*).

Especially in light of the relative absence of contrary precedents, we believe that the reasoning of these cases is sound. A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates — less successful in their attempts to delay — would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.

VIII

For the foregoing reasons, we affirm the judgment of the district court and deny Richmond's petition for a writ of habeas corpus.

AFFIRMED.

APPENDIX B

STATE OF ARIZONA)
) ss. AFFIDAVIT
County of Pima)

James M. Howard, being first duly sworn upon his oath, deposes and says:

That he is the deputy county attorney assigned to the case of State of Arizona v. Willie Lee Richmond, A-24252. That he prosecuted the case at trial. That during the course of the State's case at trial he talked with Rebecca Corrella in Tucson on several occasions. That she became angry with the state's representatives and professed her love for Mr. Richmond, threatened to take the stand for the defense and take the blame for the murder. That your affiant then personally informed Mr. Edward Bolding during the State's case in chief that Rebecca Corrella was at that time, "willing to take the rap," for Willie Richmond. That thereafter during the trial your affiant saw Mr. Bolding speaking with Rebecca Corrella and enter a small private office at the Courthouse with her. That despite her availability and apparent willingness to testify for the defense she was never called by the defense.

Your affiant further states upon information and belief that the State of California has the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings and that Rebecca Corrella would be available now for service of a subpoena under that Act.

Further affiant sayeth not.

JAMES M. HOWARD

Subscribed and sworn to before me this 7th day of November 1974.

NOTARY PUBLIC

My commission expires:

My Commission Expires Jan. 28, 1978

"Exhibit I"

Pima County Attorney
County Governmental Center
and Administration Bldg.
32 N. Stone Avenue
Tucson, Arizona 85701
792-8411
Cable

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R

APPENDIX C

STATE OF ARIZONA)
) ss. AFFIDAVIT
County of Pima)

Morris Reyna, being first duly sworn upon his oath, deposes and says:

That the attached transcript marked "Exhibit IIA" is a true and accurate transcript of a tape recorded interview which your affiant had with Daniel McKinney at the Arizona State Prison on the 6th day of November, 1974.

That the attached transcript marked "Exhibit IIB" is a true and accurate transcript of the original formal statement by Rebecca Corella made to police concerning the death of Bernard Crummit.

That affiant talked personally with Rebecca Corella in Los Angeles, California on the 2nd day of November, 1974. That she adheres to her original statement and disclaims any contrary statements. That she was seen personally by this officer who knows her and that she is available for service of a subpoena.

Your affiant further states that he saw Rebecca Corella in Tucson on numerous occasions during the trial of Willie Lee Richmond in A-24252 and saw her on at least one occasion, during that trial in the Court House, in the company of Edward Bolding, Esq.

Further affiant sayeth not.

MORRIS REYNA

Subscribed and sworn to before me this 7 day of November, 1974.

NOTARY PUBLIC

My commission expires:
July 25, 1977

"Exhibit II"

Pima County Attorney
County Governmental Center
Administration Bldg.
111 W. Congress Street
Tucson, Arizona 85701
792-8411
CA-84

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The date today is 6 November, 1974. The time now is 1058 hours.

This is Detective Reyna and Detective Condis interviewing Danny McKinney at Arizona State Prison.

MR: May I have your full name please.

DM: Daniel Lee McKinney.

MR: And your age Danny.

DM: 20.

MR: And what's your ASP number?

DM: 33341.

MR: O.K. Danny, uh, we've had a brief conversation regarding a statement you made about a killing which Rebecca Corella and Willy Richmond, this is a murder in which Richmond is presently at Arizona State Prison. The man that was killed is Bernard Crummet (ph). Do you know the victim's name in this case before I told you about it?

DM: No, I don't.

MR: O.K. Now you gave a statement regarding the death of this man to the defense attorney in this case. Do you remember the name, that man's name?

DM: Uh, Willy Richmond?

MR: No, the attorney who you spoke to.

DM: Dardis.

MR: Where was that statement taken?

DM: Right here in the prison.

MR: O.K. Now in that statement, uh, do you remember what you told him?

DM: Uh, yes, I told him that I had uh, lived with this lady named Becky Corella at 909 West Wedwick(?) and uh, she and I was going together when she gave me a statement regarding the murder where she told me that Willy Richmond had went with her, I mean killed this dude, and she was scared you know because they were gonna kill her, and I told her not to worry about it you know, and uh, as I got arrested in the meantime, I was threatened and told by Willy Richmond that he had friends up to the joint and when I get there, they were going to kill me. The way it is right now I'm still scared because there's guys here right now that's trying to kill me, and there's six people in the street who seen me, there's three who already sent messages to where I'm at, that uh, I've had it, and uh, I don't know what to do. I'm about to lose my mind in this place you know. I'm scared man.

MR: Did you live with Rebecca Corella after the killing?

"Exhibit IIA"

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DM: Yes I did live with her.

MR: O.K. Did she tell you that she had committed the homicide?

DM: No she didn't.

MR: Did she tell you who had?

DM: Yes she did.

MR: Did she tell you how it came down?

DM: Yes she did.

MR: Would you tell me how it came down, what she told you?

DM: Willy Richmond uh, beat the dude up, and then ran over the dude and uh, she was scared and she didn't know what to do so she said she was going to go to the police which she did go to the police.

MR: Since you've been in Arizona State Prison has Willy Richmond talked to you?

DM: No he hasn't, but his lawyer has.

MR: His lawyer has. Has Richmond sent any messages to you?

DM: Yes, he has.

MR: And do you remember what those messages said?

DM: That I've had it if I don't make a statement, a phoney statement regarding the murder. I've had it.

MR: Why did he want you to make a phoney statement.

DM: Because uh, he wanted me to get up in the courtroom and tell a lie.

MR: O.K. so he can get <u>off?</u>

DM: So he can try to get off the hook for killing somebody that he killed.

MR: O.K. Did you get any messages from Willy Richmond while you were at the County Jail?

DM: Yes I did.

MR: What did those messages say?

DM: My life is going be over with when he get his hands on me. Him and Spencer Watson and quite a few other different guys.

MR: O.K. now, since you've been up here in prison, you've indicated that an attorney by the name of Dardis. Do you remember his first name?

DM: No I don't.

MR: O.K. Mr. Dardis came up and talked to you. Did he threaten you in any way?

DM: Well he told me either, either I'd uh, if I was caught talking to you guys that he was going to tell Willy and that'd be all over for me since, since I'm up here, excuse me.

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MR: O.K. How many times did you talk to Dardis?

DM: Once.

MR: Once.

DM: For about an hour.

MR: O.K. Did you give him a statement at that time?

DM: Yes I did.

MR: Would you again tell me what you told him in that statement.

DM: I told him that Becky had uh, ran over the man, and I told him that uh, that she was the one that committed the murder which I wasn't telling the truth because under depression, I mean, what can you do man, you know, what can you do. I mean, me telling the truth, the only reason I'm telling the truth man because you know, I just hope man that I come out right? you know.

MR: O.K. now talk just a little bit louder. We're using a tape recorder and it's in front of you right?

DM: Right.

MR: O.K. Now did uh, this attorney make any other threats beside the one you just told me about?

DM: Well the threats he made is all he had to say you know, I'm dead man.

MR: He said that right off the bat?

DM: Yeah.

MR: O.K. Yes or no?

DM: Yes.

MR: O.K. Now, in other words, what you're saying is that the statement that you gave to Mr. Dardis is a lie and the reason it's a lie is because that Willy made threats and Mr. Dardis made threats to you?

DM: Yes.

MR: And did you also sign a statement or an affidavit?

DM: Yes I did.

MR: Is that affidavit a lie?

DM: Yes it is.

MR: And why did you sign that?

DM: 'Cause I was scared man.

MR: And because you had been threatened?

DM: That's right. Wouldn't you sign it if you were up here amongst all these wild animals man, and you know, first thing you know you walk out on the yard and somebody walks around, it'll shake you man, you know. Paranoid man.

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MR: O.K. Now is this a true and voluntary statement given by you without promise of reward, threat or duress so that the true facts may be known in this case?

DM: Yes sir.

MR: O.K. Now you've told me the complete truth as you remember it regarding the events leading up to your making that statement?

DM: Yes sir.

MR: And were you told at any time that your statement would give Willy Richmond a new trial?

DM: Yes I was..

MR: Who told you that?

DM: Mr. Dardis.

MR: Was anybody with Mr. Dardis?

DM: No.

MR: Did he take a tape recorded statement?

DM: No he did not.

MR: Then you didn't see a tape recorder playing?

DM: No.

MR: O.K. Uh, uh, have you at any time during this interview before indicated that you wished an attorney or that you wished to stop talking to us?

DM: No.

MR: O.K. And your full name again?

DM: Daniel Lee McKinney.

The time now is 1105.

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THIS WILL BE A [illegible]ED RECORDED INTERVIEW BETWEEN

AT PIMA COUNTY [illegible]TAL ON SEPT. 3RD, 1973 AT

1535 HOURS. PRESENT DET. REYNA AND DET. HUST

AND REBECCA CORELLA.

Q. REBECCA, would you please state your full name, your age, your address and your date of birth?
A. REBECCA PATINO ROMERO CORELLA, I live at 1022 S. 4th, I was born May 14, 1952.

Q. Okay REBECCA, prior to asking any questions. I have to advise you of your constitutional rights. You have the right to remain silent. Anything that you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed to you prior to questioning. Do you understand these rights?
A. Yes.

Q. Now having been advised of these rights and understanding these rights, will you answer our questions?
A. Yes.

Q. Did you have occasion to be with WILLIE RICHMOND and some other people sometime ago at ERNEST JONES' apartment?
A. Yes.

Q. Did you tell me something today that related to the death of a person in the desert somewhere on Greasewood?
A. Yes, yes, yes.

Q. Could you in your own words go into detail as to how you met this person and the circumstances surrounding the death?
A. I met him at the BIRD CAGE. I have known him quite a while, in fact at the BIRD CAGE. And that night me and him were going over to the house to wait on SHEILA because he know me and SHEILA very well. And WILLIE happened to be around and he bulldogged himself into the car and called me all kinds of names and, anyways, this man was kind of frightened and so I made WILLIE and his girlfriend FAYE leave or go outside or something. And so they did and so we sat around there waiting on SHEILA and SHEILA didn't come. It was about 1:30 and she didn't come. So finally I asked WILLIE if he would leave because the man was scared of him and that, you know.....he wasn't wanted there. WILLIE got upset with me and the man and WILLIE hit me one time and called me names and then he said he was sorry and all of a sudden he said "I'll take the man home." And so, the man was showing him where he lived and all of a sudden WILLIE just took him up on A-Mountain and beat him and hit him with a rock and then he just ran over him with the car.

Q. What car did he ran over him with?
A. With a white stationwagon.

Q. Is this the same white stationwagon that you pulled up in front....or had parked in front of the DESERT SANDS HOTEL the evening you were arrested?
A. Yes.

Q. What is FAYE'S last name?
A. I don't know her last name, all I know is that she's a runaway from transition home on 5th and Dodge.

Q. And could you give me a description of her?
A. She's kind of short like me, she's got dishwater hair, long like mine. She's got kind of like big eyes. That's about it. She looks young, she looks her age.

Q. And where is she presently staying?
A. With BERTHA GIBSON in the REFORMAS.

Q. In the Reform area?
A. Yes.

Q. And what is the description of the person that was taken out in the desert and beaten to death?
A. He was a Mexican dude and he was maybe 5'7". He was going to Pima College. I know him real good, he was going to Pima College at the time.

Q. Did he have a mustache or glasses or anything?
A. He had a mustache.

"Exhibit IIB"

Q. Do you know if he was a veteran?
A. No, I don't.

Q. Did he have any physical defects, did he walk with a limp or anything?
A. Oh, yes. He said he had something wrong with his leg. He said he had something wrong with his legs and he couldn't run that fast. He had something wrong with his legs, said he got them hurt before. I think, in fact, I think he said he was in the service before. He couldn't walk, run too good with his legs because he had something wrong with his legs.

Q. And you did personally witness all this incident, is that correct?
A. Yes.

Q. And what property was taken from this person?
A. WILLIE took his money and his watch, I think it was his watch he took.

Q. And what did he do with the watch and wallet?
A. He took everything that he wanted out of the wallet and the watch, I don't know what he did with that.

Q. Were there any credit cards involved at all that you know of?
A. No, not that I know of.

Q. And how much money did he get, do you recall?
A. I think he had about $50.

Q. And the wallet was disposed of in what manner?
A. He just threw it out the window in the desert.

Q. In the immediate proximity of where this occurred?
A. Yes.

Q. And since that time, have you had any defects with that vehicle?
A. What do you mean, defects?

Q. Has anything operated or functioned differently since this incident occurred with the car?
A. Yes. The muffler on it is rubbing against the tire underneath, I don't know how you call it, but it's rubbing against something and everytime it hits a bump or everytime you turn, it makes a noise.

Q. Did WILLIE have any response to you after this occurred? Did he say anything or threaten anybody about it?
A. Yeah. He said if anybody ever found out about it, that the only two people who could tell on him was me and FAY and we'd be in the same position if we did it, did tell.

Q. Was he driving the car that evening?
A. Yes.

Q. And did you do anything in an attempt to help him or to stop him while he was committing the robbery?
A. I asked him to leave him alone and WILLIE just pushed me and he hit me once and then the next day WILLIE made me and SHEILA and FAY go with him over to CAT JOHNSON's house where they gamble and we made excuse to leave and we left and we went to ERNEST's house to stay there and I think we were there maybe an hour before WILLIE come over. We didn't want to answer the door but finally we answered it or he was going to break it in. He dragged me off the bed and jumped on me and he jumped on FAY and he just, you know, cussed SHEILA out. We did call the police but the police never did come. And ALBERT MURPHY (ph) and ROBERT EARL (ph), I suppose you know them too, they are the two that helped me and SHEILA get away from WILLIE because we had told them to tell WILLIE we were hiding in the bushes. We told them to tell WILLIE that if he didn't give us the car keys and get away from ERNEST's house we were going to call the police.

Q. What was this fellow that was murdered wearing that evening?
A. I think he had some black slacks on and a white shirt, I'm not too sure.

Q. Did he ever say where he lived?
A. No,he didn't.

Q. Did, prior to going up there, did WILLIE mention anything about robbing him or did you ever hear WILLIE threaten that he wanted his money before he struck him? WILLIE just beat him up and took his money?
A. We were driving and all of a sudden WILLIE stopped in the desert and I asked him, what are you doing and he just said, shut up, like that. And all of a sudden he just told [illegible] dude

got out of the car and the dude said, what do you want. He said, get out. He said, I'll out. give you my money, just leave me alone. And WILLIE just started hitting on him. The dude was only maybe 24 years old.

When did he hit him with the rock?
After he knocked him out.

Knocked him down on the ground, then he beat him with the rock? How many times did he hit him with the rock?
About 4-5 times.

And then he took his property, did he do anything, go through his pockets, or what?
Yeah, he went through his pockets and got his wallet and everything and then he , I told him, you can't leave him out here like this, he might die. And WILLIE told me to shut up, that if I said anything about it I'd be the same way and he just ran over the man. He backed up and ran over him.

What did FAY say about all this?
Nothing.

Was she scared, or did she help WILLIE or what?
No, she wasn't scared. She thought WILLIE was a big hero.

Can you describe the location where this occurred?
No, I can't describe it. I could show you.

Do you know how to get there? Ok, how did you get there that night?
We went through A Mountain. Ok, do you know where the park, the center is on A Mountain?

The A Mountain area, right.
Ok, you go further up, all the way up and there is a dead end right in there.

OK, this is past the new high school there?
Yes.

OK, then you go west on a street and the street dead ends by a hill?
Yes.

Did this man ever attempt to do anything to protect himself?
Yes, he tried to hit WILLIE back.

After WILLIE had struck him first?
Well, when he got out the car and WILLIE asked him for his money, he tried to hit WILLIE and WILLIE just knocked him out.

WILLIE did ask him for his money first, did he do it forcefully?
No, he just said, give me all your money, like that. Then that man was trying to put up a fight but he couldn't because I remember when he told me that he had something wrong with his legs.

Do you know how much money was taken?
About $50.

Did you receive any part of that money? Did the other girl, FAY, receive any part of that money?
Whatever she did, it all went to WILLIE.

The only people that were present was WILLIE RICHMOND, FAY and yourself plus the man?
Yes, and then I went home and told SHEILA about it.

So SHEILA knows about it, did WILLIE ever talk to her about it?
No, I told SHEILA about it and I told SHEILA not to tell WILLIE I said anything.

Was anything ever done to the car after this occurred, was the undercarriage washed or scraped off in any way? Did you observe any blood or hair or anything on the undercarriage?
No, I left it just the way it was.

Did you see any damage to the vehicle?
Just, you know, like I said, the muffler has fallen down or something, it's making a noise when you turn or hit a bump, it rubs.

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Q. Do you recall what day of the week this was on?
A. A Saturday, I think.

Q. Do you recall the date at all? Do you recall what month it was in? Today is the third of September, was it last month?
A. Yes.

Q. Then it was in August. Did WILLIE have any weapons other than the rock?
A. No.

Q. And the man was unconscious and then WILLIE started hitting the man with a rock? OK, how many times did he run over the man?
A. Once.

Q. Did he drag the man at all with the car?
A. He just ran over him, just backed up and ran over him and kept on.

Q. Did you see what part of the body he ran over?
A. I didn't even look, no.

Q. OK. You have been aware that we have been using a tape recorder to tape this, am I correct?
A. Yes.

Q. Are you presently under the influence of any drugs or narcotics?
A. No, I'm not right now.

Q. Are you suffering any withdrawal symptoms that would effect your stability as far as your testimony or your thinking goes?
A. No. I'm feeling just fine.

Q. In other words, right now your fine, there's nothing bothering you and you've understood all your constitutional rights, is that correct? And you waived your rights to talk to us voluntarily, right? Would you respond, we can't...
A. Yes.

Q. It doesn't record shaking of the head. Ok, and you agreed to talk to us voluntarily, is that correct?
A. Yes.

Q. And no promises were made at all prior to this interview?
A. Right.

Q. Is this a true and voluntary statement given by you without promise of reward, threat or duress so that the true facts in this case may be known?
A. Yes.

Q. And all the facts you have just given us, would you be willing to testify to in a court of law?
A. Yes.

Q. May we have your full name again please?
A. REBECCA PATINO ROMERO CORELLA.

TERMINATION OF STATEMENT AT 1550 HOURS, SEPTEMBER 3, 1973.

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